

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division

THE STATE OF MARYLAND,

Plaintiff.

v.

UNITED STATES DEPARTMENT OF
JUSTICE, *et al.*,

Defendants.

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
Approved.
2018 NOV 26 PM 5:28
Counsel for
reminded that
a proposed order
should be submitted
with a motion.
ELH

Civil Action No. 1:18-cv-02849-ELH

*USOJ
11/26/18*

MOTION FOR LEAVE TO FILE BRIEF OF THE DISTRICT OF COLUMBIA,
COMMONWEALTH OF PENNSYLVANIA, AND THE STATES OF CONNECTICUT,
DELAWARE, HAWAII, ILLINOIS, MAINE, MASSACHUSETTS, NEW MEXICO, NEW
YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VIRGINIA, AND
WASHINGTON AS *AMICI CURIAE* SUPPORTING PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION, TO SUBSTITUTE DEFENDANT, AND TO EXPEDITE
CONSIDERATION

The District of Columbia, Commonwealth of Pennsylvania, and the States of Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New Mexico, New York, North Carolina, Oregon, Rhode Island, Virginia, and Washington (the “proposed *Amici* States”) move for leave to file the attached brief (Exh. 1) as *amici curiae* in support of Plaintiff State of Maryland’s Motion for Preliminary Injunction, to Substitute Defendant, and to Expedite Consideration of These Matters (ECF No. 6). Plaintiff consents to the filing of this brief, and defendants consent subject to the Court’s determination that the brief will assist the Court in resolving the issues in the case.

District courts have discretion whether to grant leave to file a brief as *amicus curiae*, and they often look for guidance to Rule 29 of the Federal Rules of Appellate Procedure, which applies to *amicus* briefs at the appellate level. *Am. Humanist Ass’n v. Md.-Nat’l Capital Park & Planning Comm’n*, 303 F.R.D. 266, 269 (D. Md. 2014); *Finkle v. Howard County, Maryland*, 12 F. Supp. 3d 780, 782-83 (D. Md. 2014); *Wash. Gas Light Co. v. Prince George’s Cty. Council*, No. CIV.A. DKC 08-0967, 2012 WL 832756, at *3 (D. Md. Mar. 9, 2012), *aff’d*, 711 F.3d 412 (4th Cir. 2013). Under Fed. R. App. P. 29(a)(2), a state may file an *amicus* brief without the consent of the parties or leave of court. In the absence of a parallel rule that applies in district court, courts generally permit the assistance of *amici curiae* “where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance.” *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996) (citations omitted); *accord Wash. Gas Light Co.*, 2012 WL 832756, at *3. This Court should grant the proposed *Amici* States leave to file the attached brief for two reasons.

First, the proposed *Amici* States have a special interest in the subject matter of Plaintiff State of Maryland’s request to enjoin Matthew Whitaker from exercising the authority of the U.S. Attorney General or to substitute Rod Rosenstein as a defendant. The Attorney General of the

United States makes many decisions fundamentally affecting the lives of proposed *Amici* States' residents. Additionally, the proposed *Amici* States work closely with the Department of Justice every day, coordinating law enforcement activities and administering hundreds of millions of dollars in grant programs. They thus have a compelling interest in the Department's ability to effectively carry out its statutory responsibilities consistent with the rule of law. Unfortunately, the legal controversy surrounding Mr. Whitaker's appointment has threatened the legitimacy of the Department's actions and the vital relationships between the Department and the States. The proposed *Amici* States therefore have an urgent interest in the resolution of this issue, so that no doubts surround the legitimacy and authority of the United States Attorney General and the United States Department of Justice.

Second, the proposed *Amici* States' brief provides helpful analysis of the relevant law. The accompanying brief addresses the proper statutory construction of the applicable federal laws, including the Attorney General succession statute and the Vacancies Reform Act of 1998. The brief also demonstrates the flaws with the 20-page legal opinion issued by the Department of Justice's Office of Legal Counsel after Maryland's motion was filed. The proposed *Amici* States have examined the applicable federal law and have concluded that Mr. Whitaker's appointment is unlawful. At minimum, it violates Congress's express and controlling statutory designation of the Deputy Attorney General as the Acting Attorney General in the event of a vacancy. This unlawful appointment requires immediate correction to prevent harms to the proposed *Amici* States caused by the actions of an improperly designated Attorney General whose decisions are subject to possible invalidation.

For the foregoing reasons, the proposed *Amici* States respectfully request leave to file the accompanying brief as *amici curiae* in support of Plaintiff State of Maryland's Motion for Preliminary Injunction, to Substitute Defendant, and to Expedite Consideration of These Matters.

November 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I caused a true and correct copy of the foregoing to be served on all counsel of record through the Court's CM/ECF system.

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